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COURT OF CRIMINAL APPEALS
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IN THE
COURT OF CRIMINAL APPEALS OF TEXAS

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COURT OF CRIMINAL APPEALS
11/29/2016
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ANTHONY ROBERT SAFIAN,	**§**	
APPELLANT	**§**	
	§	**PD-0323-16**
v.	**§**	**NOS. PD-0324-16**
	§	**PD-0325-16**
THE STATE OF TEXAS,	**§**	
APPELLEE	**§**	

§ § §

STATE'S BRIEF ON THE MERITS

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Hon. George Gallagher, Judge, 396th Judicial District Court of Tarrant County, Texas
Hon. Rainey Webb, Tarrant County Magistrate Judge
Hon. Jerry Woodlock, visiting judge

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STATE'S BRIEF ON THE MERITS

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

This brief is filed on behalf of the State of Texas by Sharen Wilson, Criminal District Attorney of Tarrant County. The appellant is challenging the Second Court of Appeals' holding that deadly conduct does not qualify as a lesser-included offense of aggravated assault of a public servant under the first prong of the *Royster*/*Rousseau* lesser-included offense analysis.

STATEMENT OF PROCEDURAL HISTORY

The Appellant was convicted by a jury of three offenses: evading arrest or detention with a vehicle, aggravated assault of a public servant, and possession of a controlled substance of less than a gram. (5 R.R. at 10-13; 1386101D C.R. at 37; 1383629D C.R. at 74; 1383630D C.R. at 45). The trial court assessed the Appellant's punishment at eighteen years confinement for

evading arrest or detention with a vehicle, eighteen years confinement for aggravated assault of a public servant,[1] and ten years confinement for possession of a controlled substance of less than a gram. The sentences were set to run concurrently. (6 R.R. at 25-26; 1386101D C.R. at 41-46; 1383629D C.R. at 79-84; 1383630D C.R. at 49-53).

On March 3, 2016, the Second Court of Appeals issued an unpublished memorandum opinion affirming the Appellant's convictions in all three causes, but modifying the trial court's written judgment in the possession of a controlled substance cause to correctly reflect that the offense is an enhanced state jail felony.[2] *Safian v. State*, Nos. 02-15-00153-CR, 02-15-00154-CR, 02-15-00155-CR, 2016 WL 828337, at *9 (Tex. App.—Fort Worth March 3, 2016, pet. granted). Among the four points of error presented by the Appellant was an argument that the trial court committed error by denying his request for a lesser-included offense instruction on deadly conduct in the aggravated assault of a public servant case. *Id*. at *6-8. The Second Court of

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1 Affirmative deadly weapon findings were made in both the aggravated assault of a public servant and evading arrest or detention with a motor vehicle convictions. (1383629D C.R. at 79-84; 1383630D C.R. at 49-54).

2 The State alleged in the indictment and proved at the punishment phase that the Appellant had two prior convictions for possession of controlled substances, enhancing the applicable punishment range to that of a third degree felony. (2 R.R. at 7-8; 6 R.R. at 25-26; 7 R.R. at 42-45; 1386101D C.R. at 5, 41-46). *See* Tex. Penal Code § 12.42(c).

Appeals held that the trial court did not err by denying the Appellant's request for the deadly conduct instruction. *Id*. at *8.

On August 24, 2016, this Court granted the Appellant's Petition for Discretionary Review to determine whether the Second Court of Appeals erred in affirming the trial court's decision to deny the lesser included offense instruction of deadly conduct.

ISSUE PRESENTED

The court of appeals erred when it affirmed the trial court's denial of the lesser-included jury charge of deadly conduct in the trial for aggravated assault on a public servant.[3]

STATEMENT OF FACTS

Acting on information that a house in southwest Fort Worth was being used as a front for drug sales, the narcotics unit of the Fort Worth Police Department had begun conducting undercover surveillance of a residence. (4 R.R. at 20-24). Sitting about a block away from the targeted house was Officer Juan Trujillo, who on September 2, 2014, observed the Appellant drive his

[3] The issue presented for review before this Court concerns only the Appellant's conviction for aggravated assault of a public servant in trial cause number 1383630D and court of appeals cause number 02-15-00154-CR. Thus, although there are three cause numbers assigned to this case, no questions for review are presently before this Court impacting the Appellant's contemporaneous convictions for evading arrest while using a vehicle or possession of a controlled substance.

truck up to the house, exit the truck, enter the house, then return to his truck all in a matter of around five minutes. (4 R.R. at 26-28). The Appellant proceeded to drive his truck from the suspected drug house's driveway onto a nearby side street, where he parked his truck in the middle of the road. Officer Trujillo and his partner Officer Carman followed the Appellant in an unmarked car. (4 R.R. at 26-29). When the Appellant stopped his truck, the officers stopped their own vehicle behind the Appellant and honked the unmarked unit's horn several times, but the Appellant did not react and the truck remained stationary in the middle of the road. (4 R.R. at 29). Because the Appellant was committing a traffic violation by blocking the roadway and had failed to use his turn signal when turning onto the side street, Officer Trujillo called for a marked police car to conduct a traffic stop on the Appellant's truck. (4 R.R. at 30, 65-66).

Responding to the call for a marked unit was Officer Matthew Pearce, who approached the Appellant's truck in his police cruiser from the front. Once Officer Pearce had parked his cruiser in front of the Appellant's truck, he activated the car's emergency lights, exited the driver's side door, and began to walk towards the truck. (4 R.R. at 31, 67, 76, 112). Notably, Officer Pearce was in his full Fort Worth Police Department uniform as he walked towards

the Appellant's truck. (4 R.R. at 67-70; 7 R.R. at 9-13 (State's Exhibits 3-7)).

As Officer Pearce walked towards the truck, the Appellant looked up and made eye contact with Officer Pearce. In response, Officer Pearce verbally ordered the Appellant to "don't move." (4 R.R. at 78). Ignoring this command, the Appellant shifted his truck into drive and began to quickly accelerate forward towards Officer Pearce. (4 R.R. at 31-32, 56, 77-79). At the time the Appellant began to drive forward, there were approximately twenty feet between where Officer Pearce stood and the Appellant's truck. (4 R.R. at 77).

Reacting to the Appellant's sudden acceleration, Officer Pearce retreated backwards towards the open driver's side door of his police cruiser and dove into the car's cabin. Although most of his body made it into the cruiser, Officer Pearce's legs were still dangling outside the door as the Appellant's truck quickly approached. (4 R.R. at 79-80). Because his legs were still exposed, Officer Pearce was concerned that the Appellant's truck would strike the open door and slam it into his legs. (4 R.R. at 81-82). As the Appellant's truck passed the police cruiser, it came within about a foot of striking the door. (4 R.R. at 83). If Officer Pearce had not moved out of the way by diving into his cruiser, he would have been struck by the Appellant's truck. (4 R.R. at 132-133).

As this was occurring, Officer Trujillo remained parked behind the Appellant's truck and watched as the truck drove towards Officer Pearce. From his vantage point, Officer Trujillo could not clearly tell whether Officer Pearce was struck. (4 R.R. at 32-34). It was this sequence of events that served as the basis for the Appellant's conviction for aggravated assault of a public servant. (1383630D C.R. at 5). But it was the events that followed the Appellant's near miss with Officer Pearce that lead to the convictions for evading arrest with a vehicle and possession of a controlled substance.

After the Appellant's truck had passed his cruiser, Officer Pearce chased after the Appellant and a high speed pursuit ensued. (4 R.R. at 86-88). In his attempt to flee from Officer Pearce, the Appellant drove the wrong way down the road and reached speeds of 80 to 90 miles per hour in a 40 mile per hour zone. (4 R.R. at 89-91). The chase lasted approximately two miles and ended with the Appellant's truck colliding in a serious accident with another vehicle driven by a civilian. (4 R.R. at 91-96; 8 R.R. at 15-29 (State's Exhibits 9-23)).

At the scene of the accident, Officer Pearce had to use his baton to break out the driver's side window of the Appellant's truck, as the Appellant was either unable or unwilling to exit his vehicle. (4 R.R. at 98-100). Once the Appellant was forcibly removed from his truck and arrested, a search of his

vehicle uncovered heroin and drug paraphernalia. (4 R.R. at 108-111, 152-154; 8 R.R. at 31-32, 34, 36-37 (State's Exhibits 25-26, 28-29)).

SUMMARY OF THE ARGUMENT

As charged in the indictment, deadly conduct does not qualify as a lesser-included offense of aggravated assault of a public servant by threat. Deadly conduct requires a showing of actual imminent danger, while the indictment alleging the Appellant committed aggravated assault required only evidence of exhibition of a deadly weapon's intended use. Under these circumstances, deadly conduct required different facts than what was alleged in the indictment and did not qualify as a lesser-included offense.

ARGUMENT

Because the resolution of this case depends in large part on the indictment alleging the Appellant committed aggravated assault of a public servant, it would be instructive to begin by laying out the precise wording contained in the indictment. Specifically, the indictment alleged that the Appellant committed aggravated assault in the following way:

> Intentionally or knowingly threaten imminent bodily injury to M. Pearce, a public servant, to-wit: an employee or officer of government, namely a police officer for the city of Fort Worth, while M. Pearce was a public servant, and the defendant did *use or exhibit* a deadly weapon during the commission of the assault, to-wit: a motor vehicle, that in the manner of its *use or intended use* was capable of causing death or serious bodily injury[.]

(1383630D C.R. at 5) (emphasis added and all caps omitted). With the wording of the indictment in mind, an analysis of the question presented for review can be fully undertaken.

I. Whether an offense qualifies as a lesser-included offense is analyzed under the two-prong standard articulated in the *Royster*/*Rousseau* line of cases

In *Royster v. State*, 622 S.W.2d 442 (Tex. Crim. App. 1981), and *Rousseau v. State*, 855 S.W.2d 666, 672 (Tex. Crim. App. 1993), this Court established the two-prong test that must be met before an instruction on a lesser-included offense must be submitted to a jury. Under the first prong, the "the lesser

included offense must be included within the proof necessary to establish the offense charged." *Royster*, 622 S.W.2d at 446. This first prong presents a pure question of law that is wholly independent of the evidence produced at trial. *Rice v. State*, 333 S.W.3d 140, 144 (Tex. Crim. App. 2011). To resolve this question of law the cognate-pleadings approach is used, which examines "the elements and facts alleged in the charging instrument" and finds lesser-included offenses from there. *Id*. (*quoting Hall v. State*, 225 S.W.3d 524, 531 (Tex. Crim. App. 2007)). Article 37.09 of the Texas Code of Criminal Procedure provides statutory guidance in resolving this first prong. *Hall*, 225 S.W.3d at 536. Particularly relevant to the Appellant's case is article 37.09(1) which instructs that "[a]n offense is a lesser included offense if [. . .] it is established by proof of the same or less than all the facts required to establish the commission of the offense charged."

The second prong of the analysis asks whether there is some evidence in the record that would allow a rational jury to determine "that if the defendant is guilty, he is guilty of only the lesser offense." *Royster*, 622 S.W.2d at 446. Whatever evidence the record contains must establish the lesser-included offense as "a valid, rational alternative to the charged offense." *Hall*, 225 S.W.3d at 536.

In the analysis conducted by the Second Court of Appeals in the Appellant's case, the intermediate court correctly laid out the dual prongs of the lesser-included offense instruction analysis articulated in *Royster* and *Rousseau*, as well as the statutory elements found in Texas Code of Criminal Procedure article 37.09. *Safian*, 2016 WL 828337, at *6. In overruling the Appellant's point of error, the Court of Appeals held that the first prong of the lesser-included offense analysis was not satisfied due to the inclusion of the language "or exhibited" in the indictment against the Appellant. *Id*. at *8 . Thus, the Second Court of Appeals did not reach the second prong regarding whether there was some evidence in the record to support the submission of the deadly conduct instruction.

II. The Second Court of Appeals correctly held that deadly conduct is not a lesser-included offense of aggravated assault under the circumstances of the indictment in the Appellant's case

At the heart of this case is a conflict between the courts of appeals in applying this Court's holding in *Bell v. State*, 693 S.W.2d 434 (Tex. Crim. App. 1985). In *Bell*, this Court held reckless conduct[4] satisfied the first prong of the

[4] At the time that this Court handed down its opinion in *Bell*, section 22.05 of the Texas Penal Code was titled "reckless conduct." In 1993, the statute was retitled "deadly conduct." However, the substantive elements of the offense remained unchanged. *See* Act of June 19, 1993, 73rd Leg., R.S., ch. 900, § 22.05, 1993 Tex. Sess. Law. Serv. 3833, 3928 (Vernon) (effective Sept. 1, 1994).

lesser-included offense analysis in regards to aggravated assault as charged in that case. *Id*. at 439. Specifically, the appellant in *Bell* was charged in the indictment with committing aggravated assault by *using* a deadly weapon. Id. at 437-38. But because *Bell* did not directly address whether charging a defendant with aggravated assault by *exhibiting* a deadly weapon, Tex. Penal Code § 22.02(a)(2), also resulted in deadly conduct being recognized as a lesser-included offense, a split in authority among the intermediate courts of appeals slowly began to emerge over the following three decades.

a. Precedent holding that deadly conduct is not a lesser-included offense when it is alleged that the defendant committed aggravated assault by "using or exhibiting" a deadly weapon

Several courts of appeals have held that the inclusion of language in the indictment alleging a defendant committed aggravated assault by "using or exhibiting" a deadly weapon prohibits deadly conduct from being a lesser-included offense. The first opinion establishing this holding was from the Amarillo Court of Appeals in *Miller v. State*, 86 S.W.3d 663, 665-67 (Tex. App.—Amarillo 2002, pet. ref'd). In the Amarillo court's analysis, the allegation that the appellant "exhibited" a deadly weapon was dispositive "as it does not necessarily follow that the danger of serious bodily injury is established when a deadly weapon is 'exhibited' in the commission of the

offense as opposed to being 'used.'" *Id*. at 667.

The Dallas Court of Appeals relied on *Miller* in reaching a similar holding in the unpublished opinion of *Schreyer v. State*, No. 05-03-01127-CR, 2005 WL 1793193, at*7-8 (Tex. App.—Dallas July 29, 2005, pet. ref'd) (not designated for publication). In reaching its conclusion that deadly conduct did not qualify as a lesser-included offense of aggravated assault with a deadly weapon, the Dallas court found significance in language from this Court's opinion in *Bell* noting "[t]he *danger* of serious bodily injury is established when a deadly weapon is used in the commission of the offense." *Schreyer*, 2005 WL 1793193, *7 (*quoting Bell*, 693 S.W.2d at 438-39). Thus, because use and danger are intertwined, the Dallas court reasoned that the proof required for deadly conduct—requiring a danger of serious bodily injury—is not the same or less than the proof required to establish aggravated assault by exhibition of a deadly weapon. *Schreyer*, 2005 WL 1793193, *7.

In addition, the Dallas court's opinion noted a further difference between the two offenses that the Amarillo court in *Miller* did not address. Specifically, deadly conduct requires proof of the danger of serious bodily injury, while aggravated assault requires only the threat of mere bodily injury. *Id*. Therefore the proof required of deadly conduct was not established by

proof of the same or less than the facts establishing aggravated assault as charged in that specific case. *Id*. at *8.

In the opinion issued by the Second Court of Appeals in the Appellant's case, both *Miller* and *Schreyer* were cited as persuasive authority in concluding that the first prong of the lesser-included offense analysis was not satisfied. *Safian*, 2016 WL 828337, at *8. However, the Second Court of Appeals focused solely on the "exhibiting" language that was central to the *Miller* decision and did not address the secondary issue identified in the *Schreyer* opinion regarding deadly conduct's requirement of a danger of serious bodily injury where aggravated assault requires only a threat of bodily injury. *Id*.

b. Precedent holding that the inclusion of "exhibited" does not impact the status of deadly conduct as a lesser-included offense of aggravated assault

On the other hand, a contrasting conclusion was reached by other courts of appeals in similarly situated cases. Chief among these cases is *Amaro v. State*, 287 S.W.3d 825 (Tex. App.—Waco 2009, pet. ref'd), which the Second Court of Appeals acknowledged but declined to follow. *Safian*, 2016 WL 828337, at *8 n. 15. The Waco court examined *Miller* and disagreed with its holding, explaining that "merely pointing a firearm in another's direction can

place that person in imminent danger of serious bodily injury. We do not agree that danger of serious bodily injury can be established only by use of a deadly weapon, but not exhibition of a deadly weapon." *Amaro*, 287 S.W.3d at 829 (internal citations omitted); *see also Airheart v. State*, No. 08-11-00037-CR, 2012 WL 1431762, at *7-9 (Tex. App.—El Paso April 25, 2012, pet. ref'd) (not designated for publication) (acknowledging both *Amaro* and *Miller* and electing to follow the reasoning of *Amaro*).

Noting that this Court's precedent in *Bell* clearly controlled when an indictment alleges use *and* exhibition of a deadly weapon, the San Antonio Court of Appeals held that the Amarillo court's reasoning in *Miller* was inapplicable under the circumstances of the indictment in *Blissit v. State*, 185 S.W.3d 51, 53-55 (Tex. App.—San Antonio 2005, pet. ref'd). There, the indictment alleged the appellant committed aggravated assault by "using and exhibiting a deadly weapon," which persuaded the San Antonio court that the "the elements of the offense 'actually charged,'" squarely placed it within the logic of the *Bell* opinion. *Id*. at 54-55.

c. A threat accomplished through the mere exhibition of a deadly weapon's intended use as required to prove aggravated assault requires less proof than the showing of actual imminent danger needed for deadly conduct

As this Court noted in *Bell*, "[a]n allegation that an offense has been

committed in one way may include a lesser offense, while an allegation that the offense was committed in another way would not include the lesser offense." *Bell*, 693 S.W.2d at 436. And that is what is at the heart of the resolution of the Appellant's case. Undoubtedly, *Bell* would control if the Appellant was charged only with using a deadly weapon. But because the Appellant was alleged to have committed aggravated assault "in another way", *Id*., by using *or* exhibiting a deadly weapon, *Bell* is not as clearly controlling. *See Patterson v. State*, 769 S.W.2d 938, 940 (Tex. Crim. App. 1989) ("At the outset it is essential to note that 'use' and 'exhibit' are not synonymous. Each word is exemplary of different types of conduct.").

A deadly weapon could be used to facilitate an associated crime, while not being exhibited. For example, a complainant may know that a gun has been pointed at the back of his head based on the sound of a pistol cocking while he is not actually able to see it. *Moore v. State*, 531 S.W.2d 140, 143 (Tex. Crim. App. 1976) (affirming aggravated robbery conviction based on "earwitness" evidence where complainant never saw a pistol). Or a defendant may use a deadly weapon to facilitate a felony by "gesturing menacingly with an object beneath his shirt" that the complainant never actually sees. *Webber v. State*, 757 S.W.2d 51, 54 (Tex. App.—Houston [14th Dist.] 1988, pet. ref'd);

see also Arceneaux v. State, 177 S.W.3d 928, 930-32 (Tex. App.—Houston [1st Dist.] 2005, pet. ref'd) (affirming aggravated robbery conviction where appellant verbally warned the complainant that he had a pistol, but the complainant never saw it).

Although this Court opined that "it is doubtful one can exhibit a deadly weapon during the commission of a felony without using it," *Patterson*, 769 S.W.2d at 940, there have been cases where exhibition has been found in the absence of a specific finding of use. For example, in *McCain v. State*, 22 S.W.3d 497 (Tex. Crim. App. 2000), this Court held that a butcher knife had been exhibited during an aggravated robbery when the appellant carried the knife in his waistband while attacking the victim with his hands. *Id*. at 501-03. In concluding the evidence was legally sufficient, this Court held "[h]ad the knife been completely concealed by appellant's clothing, additional facts would have been needed to establish that the butcher knife was used. But the knife was partially exposed, and from that exposure, the factfinder could rationally conclude that the knife was exhibited during the criminal transaction, or at least, that its presence was used by appellant to instill in the complainant apprehension, reducing the likelihood of resistance during the encounter." *Id*. at 503. Thus, this Court analyzed a scenario where a rational jury could have

concluded that a deadly weapon was exhibited but not necessarily used. Similarly, in *Wilson v. State*, 391 S.W.3d 131 (Tex. App.—Texarkana 2012, no pet.), the Texarkana Court of Appeals affirmed a conviction for aggravated assault where the appellant made verbal threats against the complainant and threateningly displayed a sledgehammer from a distance, but never swung the sledgehammer. In rejecting the appellant's legal sufficiency challenge, the Texarkana court held that "the sledgehammer was exhibited during the assault," *Id*. at 136, and that the appellant only threatened use of the sledgehammer. *Id*. at 136-37.

The legislature's intentional placement of two separate words—"uses or exhibits''—in the aggravated assault statute evidences an intention on the part of the legislature to have the words read in the disjunctive to cover two distinct scenarios. Tex. Penal Code § 22.02(a)(2). That is, when a deadly weapon is exhibited by being "consciously shown or displayed during the commission of the offense," *Patterso*n, 769 S.W.2d at 941, as opposed to when a deadly weapon is used by being "employed or utilized in order to achieve its purpose." *Id*. Because it is presumed that every word in a statute is included for a purpose and each word should be given effect is reasonably possible, *Yazdchi v. State*, 428 S.W.3d 831, 837 (Tex. Crim. App. 2014) (*quoting State v.*

Hardy, 963 S.W.2d 516, 520 (Tex. Crim. App. 1997)), it stands to reason that "use" and "exhibit" were not meant to be read in the same manner.

In keeping with this Court's holding in *Plummer v. State*, 410 S.W.3d 855 (Tex. Crim. App. 2013), that a deadly weapon must facilitate the associated felony, *Id*. at 864-65, a deadly weapon may still facilitate the associated felony by mere exhibition. Specifically, a deadly weapon may facilitate the felony of aggravated assault by threat through exhibition only—the defendant warns of the deadly weapon's "intended use," Tex. Penal Code § 1.07(a)(17)(b), by its conscious display.[5]

In the Appellant's case, the indictment alleged that the Appellant threatened Officer Pearce with imminent bodily injury by using or exhibiting a deadly weapon that in its manner of use or intended use was capable of causing death or serious bodily injury. (1383630D C.R. at 5). Thus, one method by which the State could secure a conviction was by proving the Appellant threatened Officer Pearce by exhibiting a deadly weapon's intended use. Such a reading of the indictment under the cognate pleadings approach

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[5] This allegation in the indictment further differentiates the Appellant's case from the facts analyzed by this Court in *Bell*, where the indictment alleged that Bell had threatened the complainant "with imminent bodily injury by the use of said deadly weapon." *Bell*, 693 S.W.2d at 437. In other words, the firearm in *Bell* was alleged to have actually been used, whereas the vehicle in the Appellant's case was alleged to have either been used or had its intended use exhibited.

requires less proof than what is required for misdemeanor deadly conduct. Under misdemeanor deadly conduct, proof of actual imminent danger is required as opposed to proof of a threat. *See Alexander v. State*, 146 S.W.3d 685, 687 (Tex. App.—Texarkana 2004, no pet.) ("Deadly conduct requires proof of *actual imminent danger* of serious bodily injury, while robbery and aggravated robbery require proof of *fear* of bodily injury or death, or proof of a *threat.* Proof of actual imminent danger is required to prove deadly conduct, but not to establish robbery or aggravated robbery.") (emphasis in original).

The mere exhibition of a deadly weapon's intended use in a charge of aggravated assault by threat as charged in the Appellant's case thus requires less proof than is necessary for misdemeanor deadly conduct. Because the indictment in the Appellant's case alleged that he committed aggravated assault in this manner, (1383630D C.R. at 5), deadly conduct does not qualify as a lesser-included offense in the Appellant's case and the Second Court of Appeals did not err in its holding. *Safian*, 2016 WL 828337, at *8.

III. Even if this Court concludes deadly conduct is a lesser-included offense of aggravated assault of a public servant as charged in the Appellant's case, there was insufficient evidence presented at trial to entitle the Appellant to his requested instruction

Should this Court hold that the Second Court of Appeals erred in holding deadly conduct is not a lesser-included offense of aggravated assault of a

public servant by threat, it would nevertheless be prudent for this Court to analyze the Appellant's case under the second prong of the lesser-included offense analysis. Admittedly, the Appellant's Petition for Discretionary Review presented only the issue of whether the intermediate court erred as to its application of the first prong. However, the Appellant's brief on the merits to this Court addressed the issue of the second prong analysis. *See* Brief of Appellant, at 9-12. And under these circumstances, judicial economy would be served by conducting an analysis of the second prong. *See Gilley v. State*, 418 S.W.3d 114, 119 (Tex. Crim. App. 2014) ("[W]hen the proper disposition of an outstanding issue is clear, we will sometimes dispose of it on discretionary review in the name of judicial economy.").

To satisfy the second prong of the lesser included offense analysis, the Appellant must show that "there is some evidence in the record that would permit a jury rationally to find that if the defendant is guilty, he is guilty only of the lesser included offense." *Hall*, 225 S.W.3d at 536. This standard of showing "some evidence" cannot be met simply through an attack on the believability or credibility of the State's evidence. *See Skinner v. State*, 956 S.W.2d 532, 543 (Tex. Crim. App. 1997) ("It is not enough that the jury may disbelieve crucial evidence pertaining to the greater offense. Rather, there

must be some evidence directly germane to a lesser-included offense for the factfinder to consider before an instruction on a lesser-included offense is warranted."). Further, the state of the evidence in the entire record is examined rather than inspecting individual pieces of evidence in a vacuum. *Dixon v. State*, 358 S.W.3d 250, 257 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd) (*citing Ramos v. State*, 865 S.W.2d 463, 465 (Tex. Crim. App. 1993)).

The Appellant argues the evidence supporting the submission of the deadly conduct instruction comes from two sources in the record. First, that Officer Pearce asked the Appellant why he had run once Pearce arrived at the scene of the traffic accident caused by the Appellant. Second, that there was some evidence showing the Appellant had to drive towards Officer Pearce to make any attempt at a getaway due to the conditions of the road. *See* Brief of Appellant, at 10-11. But the portions of the record the Appellant points to as supportive of the deadly conduct instruction's submission amount to no more than mere speculation rather than affirmative evidence of a reckless mental state. *See Cavazos v. State*, 382 S.W.3d 377, 385 (Tex. Crim. App. 2012) ("Meeting this threshold requires more than mere speculation—it requires affirmative evidence that both raises the lesser-included offense and rebuts or negates an element of the greater offense."). The fact that Officer Pearce did

not immediately question the Appellant as to why he attempted to run him over or strike the door of his police cruiser does not amount to affirmative evidence of anything and is closer to impeachment evidence than affirmative evidence of deadly conduct. *See Wilhoit v. State*, 638 S.W.2d 489, 499 (Tex. Crim. App. 1982) (concession by investigating officer that appellant may have had a toy gun was "more in the nature of impeachment than direct substantive evidence" entitling the appellant to a lesser-included offense instruction).

According to Officer Pearce, had he not jumped out of the way, it was a certainty that the Appellant's truck would have struck him. (4 R.R. at 132-133). This is strong evidence that the Appellant consciously sought to force Officer Pearce to move out of the way by threatening him with being hit or run over with a pickup truck. *See Dixon*, 358 S.W.3d at 258-59 (no error in denying request for lesser-included offense instruction on deadly conduct and reckless driving; evidence at trial did not allow a rational jury to conclude appellant was acting recklessly when testimony showed he was intentionally trying to run over complainant).

Defense counsel cross-examined Officer Trujillo and Officer Pearce about whether two cars could pass each other on the street where the Appellant had stopped his truck and where Officer Pearce approached him. (4

R.R. at 54-55, 119-120). The Appellant argues in his brief that in order to flee from Officer Pearce, he had to drive in a manner bringing him dangerously close to Officer Pearce due to the conditions of the road. *See* Brief of Appellant, at 11. But this testimony supports an intentional or knowing mental state rather than a reckless one, as it demonstrates that the Appellant had the conscious objective of threatening Officer Pearce with bodily injury to effectuate his escape through the only available route that Officer Pearce was blocking.

All of the evidence in the present case shows that the Appellant intentionally or knowingly pointed his truck in the direction of Officer Pearce with the intent to threaten him with imminent bodily injury. There is no evidence in the record the Appellant was either aware of the risk or consciously disregarded it, and therefore there is no evidence to support a finding that driving directly at Officer Pearce was merely a reckless act on the Appellant's part.

Because there is no evidence that if the Appellant was guilty, he was guilty only of deadly conduct, he was not entitled to receive his requested jury instruction on a lesser included offense. *See Bignall v. State*, 887 S.W.2d 21, 24 (Tex. Crim. App. 1994) ("If a defendant either presents evidence that he

committed no offense or presents no evidence, and there is no evidence otherwise showing he is guilty only of a lesser included offense, then a charge on a lesser included offense is not required.").

PRAYER

The State prays that this Court hold that deadly conduct is not a lesser-included offense of aggravated assault of a public servant as charged in the Appellant's case. Alternatively, the State prays that this Court hold the Appellant was not entitled to a lesser included offense instruction on deadly conduct due to a lack of evidence supporting the submission of the deadly conduct instruction. The court of appeals' judgment should b affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

True copies of the State's brief on the merits of the appellant's petition for discretionary review have been electronically served on opposing counsels, the Hon. Daniel Collins (daniel@danielcollinslaw.com), 3633 Airport Freeway, Fort Worth, Texas 76111, on this, the 23rd day of November, 2016.

/s/ Mark Kratovil
MARK KRATOVIL

CERTIFICATE OF COMPLIANCE

This document complies with the typeface requirements of Tex. R. App. P. 9.4(e) because it has been prepared in a conventional typeface no smaller than 14-point for text and 12-point for footnotes. This document complies with the word-count limitations of Tex. R. App. P. 9.4(i) because it contains approximately 3,922 words, excluding those parts specifically exempted by Tex. R. App. P. 9.4(i)(1), as computed by Microsoft Office Word 2010 - the computer program used to prepare the document.

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